NO. 83-1017

In the

UNITED STATES SUPREME COURT

October Term 1983

PAUL BOHRER,

Petitioner,

v.

HANES CORPORATION, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 83-1017

In the

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October Term 1983

PAUL BOHRER,	)
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Petitioner,	)
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v.	)
	)
HANES CORPORATION, et al.,	)
	)
Respondents.	)

BRIEF OF RESPONDENTS
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

The respondents, Hanes Corporation and Hanes Hosiery, Inc., respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit in this case. That opinion is reported at 715 F.2d 213 and appears in the appendix of the petition at pp. A-1 to A-21. The judgment of the United States District Court for the

Western District of Texas is set forth in the appendix of the petition at pp. A-22 to A-26.

STATEMENT OF THE CASE

The instant action was initiated by the plaintiff/petitioner, Paul Bohrer, alleging that, on or about April 18, 1978, he was discharged as a sales representative by the defendants/respondents, Hanes Corporation and Hanes Hosiery, Inc. Plaintiff alleged that the discharge was based solely upon his age (56 years in April of 1978) in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626, et seq. (During the course of the trial, the plaintiff withdrew another issue as to the alleged discriminatory reduction of his sales territory.) The defendants denied that they had discriminated against the plaintiff as alleged and affirmatively asserted, among other things, that the plaintiff had been discharged for good

cause and based upon reasonable factors other than age.

This case proceeded to trial before a jury beginning on March 2, 1982. After the plaintiff rested, defendants moved for a directed verdict and, after argument thereon, asked the court to reserve its ruling. At that time the court advised the defendants that they could renew their motion as a motion for judgment notwithstanding the verdict or by motion at the close of the evidence. On March 9, 1982 the jury returned a verdict on special interrogatories finding that, from a preponderance of the evidence, the age of the plaintiff was a determining factor in the defendants' decision to terminate the plaintiff, that such discrimination was willful, and that the sum of $167,320.00 represented the plaintiff's damages. No judgment was subsequently entered on that verdict.

On March 22, 1982 defendants moved for a judgment in favor of the defendants

notwithstanding the verdict or, in the alternative, for a new trial. On June 1, 1982 the court, noting that a motion for instructed verdict had been made by the defendants and reserved by the court, granted defendants' motion for judgment in favor of the defendants notwithstanding the verdict on the basis that "the verdict returned by the jury is against the clear weight of the evidence, and if allowed to stand, would result in a miscarriage of justice" and "that the evidence and reasonable inferences drawn therefrom point so strongly in favor of the defendants that reasonable persons could not arrive at a verdict against the defendants."

The plaintiff appealed from that judgment to the United States Court of Appeals for the Fifth Circuit. After hearing arguments thereon, the Fifth Circuit affirmed the judgment of the District Court on September 23, 1983.

STATEMENT OF FACTS

The plaintiff/petitioner, Paul Bohrer, at age 55, began his employment with Hanes Hosiery on January 1, 1977 as a salesman. His employment continued until April 18, 1978. There was no formal employment agreement.

Mr. Bohrer had been previously employed by a family-run, relatively small business, known as Texas Hosiery, which was a distributor for Hanes Hosiery and other products. On January 1, 1977, the defendants took over responsibility for direct distributorship of its Hanes products and hired Paul Bohrer and others who were within the protected age class.

The defendants/respondents, as a international company, had a different management approach than had pertained at Texas Hosiery. In addition to merely selling hosiery products, the respondents had stringent requirements with respect to the submission of various reports, the servicing of accounts, the taking of inventories, and the making of new accounts. During

his tenure with Hanes Hosiery, the plaintiff consistently failed to file timely reports and in some instances failed to file important management reports at all. He failed to follow the instructions of his supervisors in this regard as well as failing to call on new, non-traditional accounts, such as drug stores, grocery stores, book stores, etc., as instructed by his superiors. Indeed, the plaintiff repeatedly questioned the directives of his employer. Plaintiff was counseled on numerous occasions regarding his failure to meet the company's requirements. Ultimately, at a meeting on April 18, 1978 with his superiors, he was again told of his failures to adhere to the defendants' policies, his bad attitude, and his failure to do the job which defendants felt needed to be done. In response, the plaintiff indicated his dislike for being given orders, and his unwillingness to follow the dictates of his employer. At that meeting, which was tape recorded by the plaintiff, the plaintiff's

employment relationship terminated. At that time the defendants had not selected any particular person to replace him.

REASONS FOR DENYING THE WRIT

As hereinafter indicated, this case does not satisfy this court's criteria for granting review by writ of certiorari as set forth in Rule 17 of the Rules of this Court.

1. The Decision of the Court Below Affirming a Judgment Notwithstanding the Verdict Does not Conflict with Decisions of This Court and other Courts of Appeals, Nor Does It Violate the Seventh Amendment of the Constitution of the United States or the Age Discrimination in Employment Act.

Petitioner argues that the Fifth Circuit takes a "cavalier approach to jury findings" which conflicts with the positions taken by other courts of appeals. A mere examination of the Circuit Court cases cited by the petitioner rebuts that position.

The Sixth Circuit Court of Appeals in the case of Rose v. National Cash Register Corporation, 703 F.2d 225 (6th Cir. 1983),

cited by the petitioner, affirmed the lower court's denial of the defense motion for a judgment notwithstanding the verdict (j.n.o.v.) or a new trial. The court said that a j.n.o.v. is precluded "when in viewing the evidence in the light most favorable to the non-moving party, it would permit a reasonable jury to find in favor of that party." 703 F.2d at 227. In Syvock v. Milwaukee Boiler Mfg. Co., Inc., 665 F.2d 149 (7th Cir. 1981), the Seventh Circuit affirmed the district court's denial of a defendant's motion for j.n.o.v. saying that "(a)fter having fairly reviewed the record we are satisfied that there was sufficient evidence from which a reasonable jury could find that Milwaukee Boiler discriminated against the plaintiff by reason of age" but that "(t)he same is not true, however, with respect to the jury's finding of willfulness." 665 F.2d at 154. In Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193 (8th Cir. 1982), the Eighth Circuit upheld the district court's denial of a

defense motion for j.n.o.v. or a new trial. The Court said that a j.n.o.v. should be granted "'only when all the evidence points one way and is susceptible to no reasonable inferences sustaining the position of the non-moving party.'" 669 F.2d at 1195. The Court said denial of the motion is proper "'where the evidence presented allows reasonable men in a fair exercise of their judgment to draw different conclusions.'" 669 F.2d at 1196. The petitioner also cites the Eighth Circuit case of Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982) in affirming a district court grant of an employer's motion for j.n.o.v. There, the Eighth Circuit said that "(t)he court should grant a motion for judgment n.o.v. if, without weighing the witness' credibility, only one reasonable conclusion follows from the evidence presented." Petitioner cites Jackson v. Shell Oil Co., 702 F.2d 197 (9th Cir. 1983) in which the Ninth Circuit affirmed the district court's

denial of the defendant's motion j.n.o.v. The court said that "'(t)he standard is whether, when viewing the record as a whole, there is substantial evidence present that would support a finding, by reasonable jurors, for the non-moving party,'" pointing out that "'(s)ubstantial evidence is more than a mere scintilla,'" and that "'(i)t must be evidence that a reasonable mind could accept as adequate to support a conclusion'" when "'examined in a light most favorable to the prevailing party.'" 702 F.2d at 200. Petitioner also cites the case of Sweat v. Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983). That case is hardly applicable here since it involved the denial of a summary judgment motion. As the Eleventh Circuit correctly said, the question involved in a motion for summary judgment "is whether there is a genuine issue of material fact." Such a motion, of course, involves Rule 56 of the Federal Rules of Civil Procedure and not Rule 50.

Petitioner attempts to fashion a conflict between the above cases and those of the Fourth and Fifth Circuit. Petitioner cites Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982) in which the Court affirmed the district court's grant of a j.n.o.v. The Fourth Circuit said that "(t)hough it is axiomatic that in ruling on this motion, courts are to consider the evidence in the light and with all inferences most favorable to the party opposing the motion, they should do so on the basis of all the evidence, not just that favorable to the non-mover." 681 F.2d at 243, n. 14. The court cites Grooms v. Minute-Maid, 267 F.2d 541, 543 (4th Cir. 1959); Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970); and Boeing Co. v. Shipman, 411 F.2d 365, 374-375 (5th Cir. 1969) (en banc). Petitioner cites Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980), in which the Fourth Circuit affirmed a district court grant of a defendant's motion j.n.o.v. or for a new trial. In so doing, the Court said "(o)f course, the

question should not be taken from the jury if there is evidence in the case which, if accepted by the jury, would support a finding that age was a determining factor in the discharge, but we conclude that there is insufficient evidence to support such a finding in this case." 618 F.2d at 1066. Finally, in his search for a conflict, the petitioner cites the case of Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983) in which the Third Circuit affirmed the trial court's denial of the plaintiff's motions for a j.n.o.v. and for a new trial. As to granting a j.n.o.v. the court said the following:

> "On motions for a directed verdict and for judgment notwithstanding the verdict, the movant must meet a strict test. These motions require the judge 'to test the value of evidence not for its insufficiency to support a finding, but rather for its overwhelming effect. He must be able to say not only that there is sufficient evidence to support the finding, even though other evidence could support as well a contrary finding, but additionally that there is insufficient evidence for permitting any different finding.' Fireman's Fund Ins. Co. v. Videfreez Corp., supra, 540 F.2d at 1177 (quoting Mihalchak v. American Dredging Co., 266 F.2d 875,

877 [3d Cir.], cert. denied, 361 U.S. 901, 80 S. Ct. 209, 4 L.Ed.2d 157 [1959])." 706 F.2d at 119.

The Fifth Circuit's standard for reviewing a trial court's grant of a j.n.o.v. was set forth in Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969). The court said that "(o)n motions for directed verdict and for judgment notwithstanding the verdict the court shall consider all the evidence--not just the evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion" and that "(i)f the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper." 411 F.2d at 374. The Fifth Circuit, however, made it clear that "if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the

exercise of impartial judgment might reach difference conclusions, the motions should be denied, and the case submitted to the jury," indicating that "(a) mere scintilla of evidence is insufficient to present a question for the jury." Id. The Fifth Circuit said that, in order to create a jury question, "(t)here must be a conflict in substantial evidence" but was quick to point out that "it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."

Thus, a reading of the standards set forth in the above cases abundantly demonstrates that there is no real conflict between the circuits on the standard to be used in granting a j.n.o.v. All Circuits place a heavy burden upon the moving party and all require a determination as to whether the evidence is so strongly in favor of one party that reasonable persons on a jury could not arrive at a

contrary verdict. The reasonableness standard weaves a common thread throughout all of the opinions of the circuits on this subject.

To adopt the petitioner's petition that the Fifth Circuit's ruling in the instant case subverts the right to a jury trial provided under the Age Discrimination in Employment Act, would require this Court to find that Rule 50(b) does not apply to cases under that Act. Nothing in the statute itself or its legislative history warrants such a conclusion.

As to the alleged violation of the Seventh Amendment, raised for the first time in these proceedings, this Court long ago ruled that "Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial." Neely v. Eby Constr. Co., 386 U.S. 317, 18 L.Ed.2d 75, 80, 87 S.Ct. 1072 (1967); Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189 (1940).

2. The Decision Below Affirming a Judgment Notwithstanding the Verdict Does not Conflict with Decisions of Other Courts of Appeals and Applicable Decisions of this Court, and does not Violate the Seventh Amendment as it Pertains to Rule 50(b) of the Federal Rules of Civil Procedure.

Notwithstanding the petitioner's assertion to the contrary, the courts of appeals are not sharply divided on the question of the procedure outlined in Rule 50(b) of the Federal Rules of Civil Procedure as it pertains to the moving for a directed verdict at the close of all the evidence as a predicate to the making of a motion for a judgment notwithstanding the verdict.

In the instant case the defendants/respondents moved for a directed verdict at the close of the plaintiff's case. Through cross-examination of the plaintiff's witnesses, the defendants had significantly discredited their testimony and the plaintiff had otherwise failed to establish a prima facie case. The judge indicated that he thought the plaintiff's case was extremely weak, especially after listening

to a tape recording of the final meeting between the plaintiff and representatives of the defendants wherein plaintiff indicated his unwillingness to conform to company policies and directions. The judge indicated his agreement with defendants, but indicated his concern for taking the matter away from the jury at that point. Defendants then asked the judge to reserve his ruling. The judge then instructed the defendants that he would reserve his ruling and that they could again attack the sufficiency of the plaintiff's evidence "by motion for judgment n.o.v. or motion at the close of the evidence." Thereafter, defendants presented substantial evidence in support of their case. While it is true that the plaintiff presented additional testimony, it did not serve to rebut the evidence presented by the defendants and was merely repetitious of that which was presented in the plaintiff's case in chief; thus, the Fifth Circuit's comment that the plaintiff offered no rebuttal.

The sum of all of this was that the plaintiff's case was even weaker at the close of the trial than it was at the close of plaintiff's case. Given the court's indication of his desire to allow the jury to decide the case, that he would reserve his ruling on defendants' motion for directed verdict, and his instruction that the defendants had the choice of renewing their motion either at the close of the evidence or in the form of a motion for j.n.o.v., defendants believed that they had done all that was necessary to lay the predicate for a motion j.n.o.v.

One of the cases cited by the petitioner to demonstrate a so-called inflexible approach is that of Martinez Moll v. Levitt & Sons of Puerto Rico, Inc., 583 F.2d 565 (1st Cir. 1978). In that case the defendant failed to make any motion for a directed verdict at any time during the trial. Although the First Circuit refused to consider the issue of sufficiency of the evidence on review it

recognized that "(t)he most that this and other courts have done by way of relaxing the rule [50(b)] is to accept something less than full compliance where substantial compliance was shown." (Emphasis added). 583 F.2d 569. The First Circuit cited its decision in Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968 (1st Cir. 1969) as an example of how it had accepted substantial compliance where, as here, the defendants moved for a directed verdict on grounds of insufficiency of the end of the plaintiffs' case, but did not review the motion at the close of all the evidence and the district court expressly reserved ruling on the earlier motion.

Petitioner cites the case of DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978) in which the Third Circuit affirmed a district court's denial of the defendants' motion for j.n.o.v. because of failure to make a motion at the close of the evidence but remanded the case for a new trial. The Third

Circuit, nevertheless, recognized that there might be situations where a j.n.o.v. could be sustained within the discretion of the trial court despite the failure of counsel to completely comply with Rule 50(b). Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken, 536 F.2d 9, 11, n. 5 (3d Cir. 1976); Psinakis v. Psinakis, 221 F.2d 418, 422 (3d Cir. 1955).

Another so-called inflexible court, the Second Circuit, is cited by the petitioner in the case of Olivares v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814 (2d Cir. 1970). In that case the court ruled that the plaintiff was not entitled to have an appellate court order a trial court, which had entered a judgment for the defendant, to enter a judgment for the plaintiff where the plaintiff had not moved for a directed verdict under either Rule 50(a) or Rule 50(b). But the court granted a new trial on the basis that "where the undisputed evidence results in a verdict that is totally without legal support justice

requires a new trial despite counsel's failure to move for a directed verdict prior to submission of the case to the jury." 431 F.2d at 817, citing Johnson v. New York New Haven and Hartford R.R. Co., 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952). The court said "(t)o rule that an unintended flaw in procedure bars a deserving litigant from any relief is an unwarranted triumph of form over substance, the kind of triumph which, commonplace enough prior to our more enlightened days, we strive now to avoid whenever possible." 431 F.2d at 817. The Second Circuit has also held that it would take a similar position in a Rule 50(b) case where a motion was not made at the close of the evidence where "a manifest injustice" would otherwise occur since the verdict was "wholly without legal support." Sojax v. Hudson Water Ways Corp., 590 F.2d 53, 54-55 (2d Cir. 1978).

The above, then, are the so-called inflexible circuits. As can be seen, they are hardly inflexible in that each of them is willing to

accept something other than complete compliance with Rule 50(b). Other circuits, of course, take the same approach. The Fourth Circuit, for example, in Miller v. Premier Corp., 608 F.2d 973 (4th Cir. 1979) considered on appeal the question of the sufficiency of the evidence in a case notwithstanding the failure of a party to make a motion for directed verdict at the close of the evidence because the "colloquy between court and counsel" was "too confusing to permit confident assessment" and that fairness dictated that the court consider the sufficiency of the evidence. In Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981), cited by petitioner, the Seventh Circuit said that "(i)t is certainly the better and safer practice to renew the motion for directed verdict at the close of all the evidence, but '(t)he application of Rule 50(b) in any case "should be examined in the light of the accomplishment of [its] particular purpose as well as in the general context of securing a fair trial for

all concerned in the quest for truth."'" In that case the defendant had moved for a verdict at the close of the plaintiff's case, which was not renewed at the close of all of the evidence, and the trial judge reserved its ruling on the earlier motion. In Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979), vacated and remanded on other grounds, 451 U.S. 978, 68 L.Ed.2d 835, 101 S.Ct. 2301 (1981), cited by petitioner, there was no motion for a directed verdict by the defendant either at the close of the plaintiff's case or at the close of all the evidence. The defendant did request an instruction by the court to return a verdict in its favor. The Ninth Circuit found that there was substantial compliance with Rule 50(b). In another case cited by the petitioner, Splitt v. Deltona Corp., 662 F.2d 1142 (5th Cir. 1981), the court found compliance with Rule 50(b) to lay a predicate for a motion j.n.o.v. notwithstanding a failure to move for a directed verdict, where, as here,

the judge's comments indicated that "he believed a proper predicate for a judgment notwithstanding the verdict had been laid" by his reference to the right of defendants to file a j.n.o.v. after trial. Other courts have ruled similarly. U.S. v. 353 Cases, 247 F.2d 473 (8th Cir. 1957); Quinn v. Southwest Wood Products, Inc., 597 F.2d 1018 (5th Cir. 1979); Moran v. Raymond Corp., 487 F.2d 1008 (7th Cir. 1973); Lancaster v. Foster, 260 F. 5 (5th Cir. 1918), cert. denied, 249 U.S. 601, 63 L.Ed. 796, 39 S.Ct. 259 (1919).

The Second Circuit, which the petitioner attempts to fashion as an inflexible court, has held, that, in a situation such as that at bar, the judge was technically in error in reserving the case as he did, but noted that "(t)he court may have well led counsel reasonably to believe that all had been done that was necessary." Bayamon Thom McAn, Inc. v. Miranda, supra 409 F.2d at 970.

Thus, it can be seen that, the sum of these rulings is that all of the circuits require adherence to Rule 50(b) and none totally disregards the rule. But each in its own way accepts something less than complete compliance with the rule, all in the interest of justice and consistent with Rule 1 of the Federal Rules of Civil Procedure that those rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Thus, there is no conflict among the circuits on this issue.

Petitioner has cited no case in which the rulings below conflict with a ruling of this court. The only decision of this court which he cites is that of Johnson v. New York, New Haven and Hartford R.R. Co., supra, in which this court held that, where a party makes a motion for directed verdict which is reserved by the court, the trial court cannot enter a judgment in his favor after an adverse verdict unless the verdict loser files a timely motion

for judgment notwithstanding the verdict. In that case a motion to set aside the verdict and a motion for a new trial were filed but not a motion j.n.o.v. This Court noted that neither the court of appeals nor the trial court treated the motion to set aside the verdict as a motion j.n.o.v. 97 L.Ed. at 82. That, of course, is not the situation in this case. There is, therefore, no conflict between the decisions of the courts below and those of this Honorable Court.

3. The Petition Raises Issues Not Raised Below.

The petitioner raises several issues which were not raised in the courts below, and, therefore, should not be considered by this Honorable Court. The petitioner did not allege that the granting of the judgment notwithstanding the verdict by the trial court was in violation of the Seventh Amendment of the Constitution of the United States nor that it was violative of the Age Discrimination in Employment Act. Neither of these issues was

raised before the trial court or the Fifth Circuit Court of Appeals.

In addition, the petitioner did not raise the procedural issue discussed above with respect to Rule 50(b) of the Federal Rules of Civil Procedure before the trial court at the time he opposed the respondents' motion j.n.o.v. This factor was pointed out by the respondents to the Fifth Circuit, but was not discussed by the court in its opinion.

It is axiomatic that "(a) party cannot raise a new theory on appeal that was not presented to the court below." Capps v. Humble Oil and Refining Co., 536 F.2d 80, 82 (5th Cir. 1976), citing Wolf v. Frank, 477 F.2d 467 (5th Cir. 1976), cert. denied 414 U.S. 975, 38 L.Ed.2d 218, 94 S.Ct. 287 (1973) and Autrey v. Williams & Dunlap, 343 F.2d 730 (5th Cir. 1965). See also Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 294-295 (8th Cir. 1982) and Moran v. Raymond Corp., 484 F.2d 1008, 1011 (7th Cir. 1973), cert. denied, 415 U.S. 932, 39

L.Ed.2d 490, 94 S.Ct. 1445 (1974). This court has steadfastly held to a similar rule. Brown v. Socialist Workers '74 Campaign Committee (Ohio), ___ U.S. ___, 74 L.Ed.2d 250, 264, 103 S.Ct. ____ (1982); United States v. Mitchell, 445 U.S. 535, 546, n. 7, 63 L.Ed.2d 607, 618, n. 7, 100 S.Ct. 1349 (1980); Adickes v. Kress & Co., 398 U.S. 144, 147, n. 2, 26 L.Ed.2d 142, 148, n. 2, 90 S.Ct. 1598 (1970); Lawn v. United States, 355 U.S. 339, 362-363, n. 16, 2 L.Ed.2d 321, 337, n. 16, 78 S.Ct. 311 (1958); California v. Taylor, 353 U.S. 553, 557, n. 2, 1 L.Ed.2d 1034, 1037, n. 2, 77 S.Ct. 1037 (1957); Husty v. United States, 282 U.S. 697, 701-702, 75 L.Ed. 629, 633, 51 S.Ct. 240 (1931); Duignan v. United States, 274 U.S. 195, 200, 71 L.Ed. 996, 1001, 47 S.Ct. 466 (1927).

Thus, the respondents urge this Honorable Court to decline to consider the issues raised by the petitioner in that they were not raised in the courts below and were thus waived.

4. Only Questions of Evidence and Factual Findings are Involved

By his petition, the petitioner is merely seeking a reevaluation by this court of the evidence and the findings of fact. Respondents do not shrink from such an analysis since it is abundantly clear from the record that the evidence is overwhelmingly in favor of the respondents. To establish a prima facie case of discharge by reason of age discrimination the plaintiff must establish the following:

> "(1) The employee's membership in the protected group; (2) his discharge; (3) His replacement with a person outside the protected group; and (4) his ability to do the job. (Marshall v. Goodyear Tire and Rubber Co., 554 F.2d 730, 15 F.E.P. Cases 139 [5th Cir. 1977]; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817, 5 F.E.P. Cases 965 [1973])."

The record is replete with evidence that the plaintiff not only failed and refused to follow the instructions and directions of his superiors, but that in many ways he was not qualified for this job which was far more complex than that which he held previously with the smaller Texas Hosiery Company. Thus, it is clear that

plaintiff failed even to establish a prima face case.

Review of the evidence, of course, is not appropriate here. This court has said "(w)e do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227, 69 L.Ed. 925, 926 (1925).

Thus, respondents urge that this court deny the petition for certiorari as an attempt by petitioner to secure a review of the evidence by the court.

CONCLUSION

For all of the above stated reasons, respondents believe that this court should deny the petition for writ of certiorari and respectfully request this court to so rule.

Respectfully submitted,

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